

State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

WHITE MOUNTAINS EDUCATION ASSOCIATION,
NEA-NEW HAMPSHIRE, AFFILIATE #1

Complainant

and

ROLAND SCHOEPF, In his capacity as
Superintendent of Schools

Respondent

CASE NO. M-0515:4

DECISION 82-43

APPEARANCES

Representing the Complainant, WMEA, NEA-NH Affiliate #1:

John Fessenden, UniServ Director, Region V

Representing the Respondent, Roland Schoepf:

Jay C. Boynton, Esquire, Counsel
William B. McCann, Jr., Business Administrator

BACKGROUND

A motion for rehearing was filed by the White Mountain Education Association on December 23, 1981 on a decision by the PELRB in case No. M-0515:4, Decision #81-62 (December 4th, 1981). A motion for rehearing was also filed by the White Mountain School Board, received by the PELRB on December 28, 1981.

A notice of rehearing was issued on March 23, 1982 by PELRB and a rehearing on Case #M-0515:4 was held on April 1, 1982 at the offices of PELRB in Concord.

The original case revolved around the dismissal of one Gary Savage for alleged misconduct involving the taking of food ("snacks") from the school kitchen while on duty.

The decision by the PELRB (#81-62), based on its hearings, concluded that there was "A justifiable misunderstanding" as to what could/could not be consumed by the night shift custodians and found the School Board guilty of an unfair labor practice under RSA 273-A:5. Mr. Savage was ordered reinstated and

all references to this incident were ordered expunged from his personnel record. No award of back pay or benefits were made to Mr. Savage on the ground that he had received unemployment compensation and was otherwise employed in the interim period.

REHEARING ARGUMENTS

The White Mountain Association, in asking for a rehearing argued that Mr. Savage was entitled to the differential between his unemployment and part-time employment and the amount he would have received had the district not dismissed him.

The White Mountain School Board, in arguing for a rehearing made the following arguments:

- (1) the complainant's original complaint was not clear and concise enough to permit proper defense against it, constituting a denial of due process;
- (2) the records of the Department of Employment Security relative to the complainant, Gary Savage, were not made available to the respondent, thereby denying them due process;
- (3) the PELRB found that "no factual evidence was presented at the hearing to justify the change of theft of food by Savage", that this is a "mischaracterization" of the record and that the record shows that the managers acted within their "managerial prerogative" under RSA 273A and in a reasonable manner, and that this mischaracterization is in error and cannot form the basis of the PELRB's decision and order.
- (4) PELRB decision, 81-62 does not make any finding of fact constituting an unfair labor practice as defined by RSA 273:5 nor does the PELRB find any specific sections of 273A:5 to have been violated, thus the PELRB is without jurisdiction in this matter since it does not constitute an unfair labor practice under the law.

RULINGS OF LAW

At the rehearing conducted on April 1, 1982, it was re-established that the School district managers believed that Savage's behavior was not responsible, nevertheless testimony and a review of the original hearing succeeds in showing, as the Board originally found, that an interpretation of "misunderstanding" could easily apply, specifically in this incident and the fact that no warning or other communication was made to Savage by the managers in connection with the consumption of "snacks". Respondent's objection to the original finding of the Board is not accepted by the Board, nor is the Respondent's claims of the imprecision of the claimant's case out of line with the usual practice of the Board, (attempts by the Board to improve this situation to the contrary notwithstanding). The role of the Department of Security records in the Board's decision was not of such a nature to deny due process to either side by not having access to them, indeed, the issue was clearly explored at the time of the original hearing, and both parties had ample opportunity to question DES representatives on the process of arriving at their decision.

At to the question of PELRB jurisdiction, Respondent raises an issue which has caused the Board to review extensively the original hearing as well as the rehearing materials.

The original complaint specified that 273A:5, I (a) and (d) were the applicable sections of the statute that were violated, constituting an unfair labor practice under the law, 273A:5(a). At hearing and rehearing, no case was made that the employer dismissed Savage because of his Union activities, although this might be inferred as a hidden motivation in dealing with Savage in the manner they did. No specific "linkage" between Savage's Union activities and his discharge were developed to support this charge.

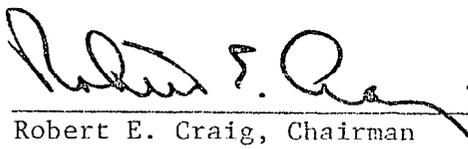
273A:5(d): Again, at hearing and rehearing no case was developed to indicate that the employer took action to punish Savage because he had "filed a complaint, affidavit, or petition" which seems to be required by law.

While the Board feels that the action of dismissing Savage, surrounded as it was with misunderstanding and the lack of clear actions by the managers to deal with the problem, was unfair, it cannot substitute its judgment for management prerogative, even if actions are unfair, unless it can be clearly related to the Public Employee Labor Relations Law. In short, actions may be unfair but not an unfair labor practice. No such demonstration appeared in this case.

DECISION

The PELRB finds:

- (1) That it must reverse its original finding, lacking jurisdiction to find an unfair labor practice.



Robert E. Craig, Chairman
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Signed this 17th day of June, 1982.

By unanimous vote. Chairman Robert E. Craig, presiding. Present and voting James C. Anderson, Russell F. Hilliard, Esquire, David L. Mayhew, Seymour Osman. Also present, Executive Director Evelyn C. LeBrun.